Supreme Court, U.S.
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In The

Supreme Court of the United States

APC ACQUISITION CORPORATION, INC.,

Petitioner,

v.

ATLANTECH, INC.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

What factors should federal appellate courts consider when evaluating the finality of a purportedly ambiguous district court judgment?

Does a federal appellate court have the legal authority to revisit the merits of a two-year old judgment when its appellate jurisdiction is based solely on the district court's denial of a motion to reopen the case?

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 14.1(b), a list of all parties to the proceeding in the United States Court of Appeals for the First Circuit is as follows:

The Petitioner here, and a Respondent in the United States Court of Appeals for the First Circuit, is APC Acquisition Corporation, Inc.;

The Respondent here, and the Petitioner in the United States Court of Appeals for the First Circuit, is Atlantech, Inc.; and

Additional Respondents in the United States Court of Appeals for the First Circuit are American Panel Corporation and Universal Avionics Systems Corporation.

Pursuant to Supreme Court Rule 29.6, Petitioner APC Acquisition Corporation, Inc. states that: (1) it has no parent corporation; and (2) no publicly-held company owns 10% or more of its stock.

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APC Acquisition Corporation, Inc. ("Petitioner") respectfully petitions for a writ of certiorari to review the May 19, 2010 judgment of the United States Court of Appeals for the First Circuit in this case.

OPINIONS BELOW

The March 24, 2008 memorandum opinion of the United States District Court for the District of Massachusetts (Tauro, J.) is reported at 540 F. Supp. 2d 274 and reproduced in the Appendix at App. 16 – App. 45. The accompanying order and judgment are unreported and reproduced in the Appendix at App. 46 – App. 48.

The May 7, 2008 order of the district court denying Plaintiff Atlantech Inc.'s first motion to reopen case is unreported and was electronically entered. No reproducible copy of the May 7 order exists.

The October 27, 2008 judgment of the United States Court of Appeals for the First Circuit is unreported and reproduced in the Appendix at App. 6 – App. 7.

The April 22, 2009 order of the district court denying Atlantech Inc.'s second motion to reopen case and for clarification is unreported and was entered in the margin of the motion. No reproducible copy of the April 22 order exists.

The December 30, 2009 order of the court of appeals is unreported and reproduced in the Appendix at App. 4 – App. 5.

The January 11, 2010 memorandum of the district court is reported at 679 F. Supp. 2d 150 and reproduced in the Appendix at App. 8 – App. 15.

The May 19, 2010 judgment of the court of appeals is unreported and reproduced in the Appendix at App. 1 – App. 3.

JURISDICTION

The judgment of the court of appeals was entered on May 19, 2010. The court of appeals denied Petitioner's timely petition for rehearing and rehearing en banc on June 14, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

REGULATORY PROVISIONS INVOLVED

FEDERAL RULE OF APPELLATE PROCEDURE RULE 4 APPEAL AS OF RIGHT – WHEN TAKEN

(a) Appeal in a Civil Case.

(1) Time for Filing a Notice of Appeal.

(A) In a civil case, except as provided in Rules 4(a)(1)(B), 4(a)(4), and 4(c), the notice of appeal

required by Rule 3 must be filed with the district clerk within 30 days after the judgment or order appealed from is entered.

(B) When the United States or its officer or agency is a party, the notice of appeal may be filed by any party within 60 days after the judgment or order appealed from is entered.

(C) An appeal from an order granting or denying an application for a writ of error coram nobis is an appeal in a civil case for purposes of Rule 4(a).

(2) Filing Before Entry of Judgment. A notice of appeal filed after the court announces a decision or order – but before the entry of the judgment or order – is treated as filed on the date of and after the entry.

(3) Multiple Appeals. If one party timely files a notice of appeal, any other party may file a notice of appeal within 14 days after the date when the first notice was filed, or within the time otherwise prescribed by this Rule 4(a), whichever period ends later.

(4) Effect of a Motion on a Notice of Appeal.

(A) If a party timely files in the district court any of the following motions under the Federal Rules of Civil Procedure, the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion:

(i) for judgment under Rule 50(b);

(ii) to amend or make additional factual findings under Rule 52(b), whether or not granting the motion would alter the judgment;

(iii) for attorney's fees under Rule 54 if the district court extends the time to appeal under Rule 58;

(iv) to alter or amend the judgment under Rule 59;

(v) for a new trial under Rule 59; or

(vi) for relief under Rule 60 if the motion is filed no later than 28 days after the judgment is entered.

(B)(i) If a party files a notice of appeal after the court announces or enters a judgment – but before it disposes of any motion listed in Rule 4(a)(4)(A) – the notice becomes effective to appeal a judgment or order, in whole or in part, when the order disposing of the last such remaining motion is entered.

(ii) A party intending to challenge an order disposing of any motion listed in Rule 4(a)(4)(A), or a judgment's alteration or amendment upon such a motion, must file a notice of appeal, or an amended notice of appeal – in compliance with Rule 3(c) – within the time prescribed by this Rule measured from the entry of the order disposing of the last such remaining motion.

(iii) No additional fee is required to file an amended notice.

(5) Motion for Extension of Time.

(A) The district court may extend the time to file a notice of appeal if:

(i) a party so moves no later than 30 days after the time prescribed by this Rule 4(a) expires; and

(ii) regardless of whether its motion is filed before or during the 30 days after the time prescribed by this Rule 4(a) expires, that party shows excusable neglect or good cause.

(B) A motion filed before the expiration of the time prescribed in Rule 4(a)(1) or (3) may be ex parte unless the court requires otherwise. If the motion is filed after the expiration of the prescribed time, notice must be given to the other parties in accordance with local rules.

(C) No extension under this Rule 4(a)(5) may exceed 30 days after the prescribed time or 14 days after the date when the order granting the motion is entered, whichever is later.

(6) Reopening the Time to File an Appeal. The district court may reopen the time to file an appeal for a period of 14 days after the date when its order to reopen is entered, but only if all the following conditions are satisfied:

(A) the court finds that the moving party did not receive notice under Federal Rule of Civil Procedure 77(d) of the entry of the judgment or order sought to be appealed within 21 days after entry;

(B) the motion is filed within 180 days after the judgment or order is entered or within 14 days after the moving party receives notice under Federal Rule of Civil Procedure 77(d) of the entry, whichever is earlier; and

(C) the court finds that no party would be prejudiced.

(7) Entry Defined.

(A) A judgment or order is entered for purposes of this Rule 4(a):

(i) if Federal Rule of Civil Procedure 58(a)(1) does not require a separate document, when the judgment or order is entered in the civil docket under Federal Rule of Civil Procedure 79(a); or

(ii) if Federal Rule of Civil Procedure 58(a)(1) requires a separate document, when the judgment or order is entered in the civil docket under Federal Rule of Civil Procedure 79(a) and when the earlier of these events occurs:

- the judgment or order is set forth on a separate document, or

- 150 days have run from entry of the judgment or order in the civil docket under Federal Rule of Civil Procedure 79(a).

(B) A failure to set forth a judgment or order on a separate document when required by Federal Rule of Civil Procedure 58(a)(1) does not affect the validity of an appeal from that judgment or order.

FEDERAL RULE OF CIVIL PROCEDURE 58 ENTERING JUDGMENT

(a) Separate Document. Every judgment and amended judgment must be set out in a separate document, but a separate document is not required for an order disposing of a motion:

(1) for judgment under Rule 50(b);

(2) to amend or make additional findings under Rule 52(b);

(3) for attorney's fees under Rule 54;

(4) for a new trial, or to alter or amend the judgment, under Rule 59; or

(5) for relief under Rule 60.

(b) Entering Judgment.

(1) ***Without the Court's Direction.*** Subject to Rule 54(b) and unless the court orders otherwise, the clerk must, without awaiting the court's direction, promptly prepare, sign, and enter the judgment when:

(A) the jury returns a general verdict;

(B) the court awards only costs or a sum certain; or

(C) the court denies all relief.

(2) ***Court's Approval Required.*** Subject to Rule 54(b), the court must promptly approve the form of the judgment, which the clerk must promptly enter, when:

(A) the jury returns a special verdict or a general verdict with answers to written questions; or

(B) the court grants other relief not described in this subdivision (b).

(c) Time of Entry. For purposes of these rules, judgment is entered at the following times:

(1) if a separate document is not required, when the judgment is entered in the civil docket under Rule 79(a); or

(2) if a separate document is required, when the judgment is entered in the civil docket under Rule 79(a) and the earlier of these events occurs:

(A) it is set out in a separate document; or

(B) 150 days have run from the entry in the civil docket.

(d) Request for Entry. A party may request that judgment be set out in a separate document as required by Rule 58(a).

(e) Cost or Fee Awards. Ordinarily, the entry of judgment may not be delayed, nor the time for appeal extended, in order to tax costs or award fees. But if a timely motion for attorney's fees is made under Rule 54(d)(2), the court may act before a notice of appeal has been filed and become effective to order that the motion have the same effect under Federal Rule of Appellate Procedure 4(a)(4) as a timely motion under Rule 59.

FEDERAL RULE OF CIVIL PROCEDURE 60 RELIEF FROM A JUDGMENT OR ORDER

(a) Corrections Based on Clerical Mistakes; Oversights and Omissions. The court may correct a clerical mistake or a mistake arising from oversight or omission whenever one is found in a judgment, order, or other part of the record. The court may do so on motion or on its own, with or without notice. But after an appeal has been docketed in the appellate court and while it is pending, such a mistake may be corrected only with the appellate court's leave.

(b) Grounds for Relief from a Final Judgment, Order, or Proceeding. On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:

(1) mistake, inadvertence, surprise, or excusable neglect;

(2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);

(3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;

(4) the judgment is void;

(5) the judgment has been satisfied, released or discharged; it is based on an earlier judgment that

has been reversed or vacated; or applying it prospectively is no longer equitable; or

(6) any other reason that justifies relief.

(c) Timing and Effect of the Motion.

(1) ***Timing.*** A motion under Rule 60(b) must be made within a reasonable time – and for reasons (1), (2), and (3) no more than a year after the entry of the judgment or order or the date of the proceeding.

(2) ***Effect on Finality.*** The motion does not affect the judgment's finality or suspend its operation.

(d) Other Powers to Grant Relief. This rule does not limit a court's power to:

(1) entertain an independent action to relieve a party from a judgment, order, or proceeding;

(2) grant relief under 28 U.S.C. § 1655 to a defendant who was not personally notified of the action; or

(3) set aside a judgment for fraud on the court.

(e) Bills and Writs Abolished. The following are abolished: bills of review, bills in the nature of bills of review, and writs of coram nobis, coram vobis, and audita querela.

STATEMENT

The underlying facts of this case are complex, but that complexity need not delay this Court long. What matter are this case's bizarre procedural turns.

Atlantech Incorporated ("Atlantech") sells specialized liquid crystal displays for use on aircraft. Atlantech historically purchased such displays from American Panel Corporation ("American Panel"), formerly a wholly-owned subsidiary of Universal Avionics Systems Corporation ("Universal"). In early 2007, Universal and American Panel sold some of American Panel's assets to Petitioner.

On February 21, 2007, Atlantech filed suit against American Panel, Universal, and Petitioner in the United States District Court for the District of Massachusetts, invoking the diversity jurisdiction conferred by 28 U.S.C. § 1332. On September 12, 2007, Atlantech filed its Second Amended Complaint against those defendants, alleging (1) breach and anticipatory breach of warranty, by all defendants; (2) breach of contract, by all three; (3) breach of contract, by all defendants; (4) breach and anticipatory breach of contract, by all defendants; (5) negligent misrepresentation, by American Panel; and (6) intentional interference with contractual relations, by Universal Avionics and Petitioner. Atlantech also sought preliminary and permanent injunctive relief from all three defendants.

On November 1, 2007, Atlantech moved for partial summary judgment "to establish that [Petitioner

was] the assignee of the contractual obligations owed by [a successor-in-interest of] American Panel . . . to Atlantech." On November 27, Petitioner cross-moved for partial summary judgment in its favor on the same issue, and Universal moved for summary judgment in its favor on all of Atlantech's claims.

On March 24, 2008, the district court entered an order disposing of these motions. App. 46 – App. 47.

Purportedly "[w]ith respect to the contract assignment issue," the district court "ALLOWED" Atlantech's motion for partial summary judgment, "DENIED" Petitioner's cross-motion for partial summary judgment, and "ALLOWED" Universal's motion for summary judgment. App. 46. The district court also "ALLOWED" Atlantech's request for injunctive relief. App. 47.

In the memorandum opinion accompanying the order, the district court clarified:

> Because the Atlantech contracts were assigned from American Panel to [Petitioner], American Panel cannot incur any liability under these contracts. Universal, therefore, as American Panel's parent company, cannot incur any liability because its subsidiary has no liability. As such, Universal's *Motion for Summary Judgment* is ALLOWED as to Counts I, II, III, and IV of the Second Amended Complaint.

App. 34 – App. 35. The court added that "Counts V and VI [would] be addressed later." App. 35 n.61.

The district court found grounds to grant Atlantech's motion for partial summary judgment, to grant Atlantech's request for injunctive relief as a remedy, and to deny Petitioner's cross-motion for partial summary judgment. The district court further concluded:

> In view of this court's decision on summary judgment and Atlantech's request for injunctive relief, this court need not reach Atlantech's claims for negligent misrepresentation and intentional interference. This includes [Petitioner's] *Motion for Summary Judgment* and Universal's *Motion for Summary Judgment* with respect to [Counts V and VI of the Second Amended Complaint].

App. 44 n.87.

The district court also concluded that Atlantech's claims for relief arising from a specific subset of aircraft displays that it had purchased from American Panel had a "less developed" record, "and analysis of [those] transactions [was] unnecessary to the outcome in th[e] matter." App. 25.

The same day, the district court, by its clerk, entered a separate judgment which stated in full:

> In accordance with the Court's MEMORANDUM and ORDER of MARCH 24, 2008, it is hereby ordered:

JUDGMENT FOR PLAINTIFF ATLANTECH, INC. and for DEFENDANT UNIVERSAL AVIONICS SYSTEMS CORP.

App. 48.

Petitioner appealed the district court's March 24 memorandum, order, and final judgment on March 27, 2008. Atlantech *never* appealed the district court's March 24 order, judgment, or memorandum. Exactly seven months later, the United States Court of Appeals for the First Circuit, in a one-page per curiam order, "summarily *affirmed*" "[t]he judgment of the district court," "*denied*" Atlantech's "request for a ruling regarding the so-called 'administrative closure' of the case," and "*den*[*ied*] [Atlantech's] motion for damages for a frivolous appeal." App. 6, 7. Crucially, in issuing this judgment, the court of appeals noted that "[a]n appeal of the denial of [Atlantech's] motion to reopen was available but not taken." App. 7.

Atlantech *did* file a motion to reopen the case on May 1, 2008, after the time to appeal had expired. The district court summarily denied that motion, without explanation, on May 7. Atlantech never appealed the denial of this first motion to reopen.

Nearly five months after the court of appeals issued its mandate, Atlantech filed a second "Motion to Reopen and for Clarification" in the district court. Almost one month later the district court denied Atlantech's motion without explanation.

Atlantech finally brought this case to the appellate court's door on May 21, 2009 – almost one year and two months after the district court entered final judgment in Atlantech's *favor*, and almost seven months after the court of appeals summarily affirmed that judgment on the merits – by appealing the district court's denial of its second motion to reopen. Over seven months later, on December 30, 2009, the court of appeals issued a one-page, per curiam order that purported to breathe new life into the parties' long-resolved dispute.

The court of appeals' order, issued more than a year after it summarily affirmed the district court's order and final judgment, stated in pertinent part:

> It is unclear to us why the [district] court closed the case in the first place. The order, memorandum, and separate judgment of March 24, 2008, decided some claims (in part or whole) on the merits, bypassed others (apparently as moot), and awarded only injunctive relief on the contractual claims despite finding that Atlantech had suffered damages from [Petitioner's] breach of contract. There was unfinished business at the time of the judgment and we should like to know why the court declined to conduct further proceedings. Until it clarifies its thinking, we take no view as to when the judgment became final – with the entry of the March 2008 judgment; the first denial of reopening;

> the second denial of reopening; or, as [Atlantech] maintains, never.

App. 4 – App. 5.

The court of appeals then remanded "[t]he matter . . . for clarification of the district court's order," extraordinarily directing the district court "to file a written response . . . no later than 30 days from the date" of the court of appeals' order. App. 5.

The district court responded with a memorandum dated January 11, 2010. App. 8 – App. 15.

There, the district court recounted its decision to "grant[ ] summary judgment . . . in favor of [Atlantech] on its contract claims, and [to] order[ ] specific performance and injunctive relief," noting that, "[i]n so doing, th[e district] court also held that it 'need not reach Atlantech's claims for negligent misrepresentation and intentional interference,' lodged against all defendants in the case." App. 9 – App. 10. Finally, the district court stated clearly, without qualification, its choice to "enter[ ] judgment in favor of Atlantech, closing the case." App. 10.

The district court next discussed how, without guidance from Atlantech, it considered the first motion to reopen "a motion for reconsideration pursuant to Rule 60(b)." App. 10. The district court cited specific, binding precedent as grounds for denying the motion outright. App. 11. The district court further noted that, "in reviewing [Atlantech's] arguments [for reopening the case], [the court] did not discern any

cognizable basis for relief from judgment under Rule 60(b)," but rather saw only "an attempt to relitigate issues directly considered in th[e] court's 22-page *Memorandum* that accompanied the *March 2008 Order*." App. 12. The district court stated that "[a] separate discussion on the tort claims and damages," which Atlantech persistently argued that the district court had overlooked, "would have been redundant, in light of the fact that th[e district] court had already ordered specific performance of the contract and injunctive relief." App. 12.

The district court pointed out that "[t]he proper procedure for any grievances arising from the [March 28] *Memorandum* was an appeal. . . . In failing to [file a direct appeal of the March 28 order and judgment], Atlantech forfeited its right to challenge the correctness of th[e district] court's entry of judgment." App. 13.

With regard to Atlantech's second motion to reopen the case, the district court found it "clear . . . , in essence, [that Atlantech's] *Second Motion to Reopen* attacked the propriety of th[e district] court's original entry of judgment on March 24, 2008." App. 14. In denying Atlantech's motion, "th[e district] court reasoned that it would not be proper to revisit the March 24, 2008 judgment, in light of" the court of appeals' intervening summary affirmance of that judgment. App. 14.

Moreover, on the merits, the district court noted that "Atlantech raised no new material arguments in

its *Second Motion to Reopen* that would justify post-judgment relief." App. 14. Once again, the district court "understood that, by declining to file an appeal of either th[e] court's *March 2008 Order* or the order denying the *First Motion to Reopen*, [Atlantech had] waived or forfeited its right to challenge the substance of that decision." App. 14 – App. 15. In fact, the district court noted that it relied on the language used by the court of appeals in its October 27, 2008 judgment, making this precise point, in denying Atlantech's second motion to reopen the case. App. 51.

The court of appeals rejected this extensive, detailed, and reasoned clarification of why the district court (1) entered judgment for Atlantech and Universal and (2) denied Atlantech's repeated motions to reopen the case. Instead, in May 2010, the appellate court took the breathtaking step of "find[ing] that the [March 2008] Judgment was too ambiguous to be final when it was entered." App. 2.

According to the court of appeals, "the Judgment . . . neither purported to be final nor explicitly terminated the entire case" – despite the entry of a separate judgment in accordance with Federal Rule of Civil Procedure 58(a) – and "the undocketed closure of the case did not resolve all doubts in favor of finality." App. 2. Rather, concluded the court of appeals, "the Judgment did not become cumulatively final until April 22, 2009" – over a year after it was entered, and nearly six months after the court of appeals summarily affirmed the judgment on its merits

– "when the district judge denied reopening a second time, leaving the case for dead." App. 2.

"In the interest of fairness" – presumably meaning fairness to Atlantech, and certainly not to Petitioner, its co-defendants, or the district court – the court of appeals performed deft procedural gymnastics to "treat Atlantech's appeal of the second denial of reopening," not as an appeal of the denial of a Rule 60(b) motion, but rather "as its timely appeal of the cumulatively final judgment." App. 2.

With that table set, the court of appeals served its pièce de résistance: partial vacatur of the March 2008 final judgment to permit relitigation of "the other summary judgment issues that were pending before March 24, 2008" but, at least in the court of appeals' eyes, that were not resolved by the district court's judgment. App. 3.

REASONS FOR GRANTING THE PETITION

The court of appeals did violence to this Court's clear statement of the proper scope of appellate review from the denial of Rule 60(b) relief, thus disregarding notions of repose and finality central to the American legal system. As this Court has long recognized, "[i]nroads on the concept of finality tend to undermine confidence in the integrity of [judicial]

procedures." *United States v. Addonizio*, 99 S. Ct. 2235, 2240 n.11 (1979) (citation omitted).[1]

The scope of appellate review from an order denying relief sought under Federal Rule of Civil Procedure 60(b) is well-established: "[t]he Court of Appeals may review the [district court's] ruling for abuse of discretion, . . . [but] an appeal from denial of Rule 60(b) relief does not bring up the underlying judgment for review." *Browder v. Dir., Dep't of Corr. of Ill.*, 98 S. Ct. 556, 560 n.7 (1978).[2]

Here, however, the court of appeals "treat[ed] Atlantech's appeal of the second denial of reopening as its timely appeal of the cumulatively final judgment," revisited and reviewed the merits of the

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[1] Especially relevant here, "[t]he Court's interest in ensuring compliance with proper rules of judicial administration is particularly acute when those rules relate to the integrity of judicial processes." *Hollingsworth v. Perry*, 130 S. Ct. 705, 713 (2010) (per curiam).

[2] Prior to this litigation, the court of appeals generally agreed. *See Karak v. Bursaw Oil Corp.*, 288 F.3d 15, 18-19 (1st Cir. 2002) ("While a motion for relief from judgment can be filed under certain circumstances, an appeal from the denial of such a motion will not expose the merits of the underlying judgment to appellate scrutiny.") (citations omitted); *Rodriguez-Antuna v. Chase Manhattan Bank Corp.*, 871 F.2d 1, 2 (1st Cir. 1989) ("[A] punctual appeal from an order denying [a Rule 60(b) motion for relief from a judgment] does not automatically produce a Lazarus-like effect; it cannot resurrect [an appellant's] expired right to contest the merits of the underlying judgment, nor bring the judgment itself before [the court of appeals] for review.") (citations omitted).

underlying judgment, and concluded that the district court erred in entering judgment for Atlantech and Universal and closing this case. App. 2.

In doing so, the court of appeals struck at the heart of the 30-day appeal time limit set by Federal Rule of Appellate Procedure 4(a)(1)(A); that limit means nothing if a district court's separate, final judgment may be revisited by an appellate court more than two years after taking effect. Finally, the court of appeals established a procedural anomaly, placing itself in direct conflict with federal appellate courts that treat district courts' final judgments for what they are: *final*, subject only to timely, direct appeal or collateral attack in the district court.

The court of appeals thus created a material conflict with other federal appellate courts on the issue of how to determine when a district court's judgment becomes final. *See* Sup. Ct. R. 10(a). This conflict demands a standardized procedure by which all federal appellate courts can interpret judgments issued by district courts below. This unresolved matter, central to crucial issues of finality and repose in the structure of the federal judiciary, makes certiorari appropriate in this case.

I. A UNIFORM METHODOLOGY IS REQUIRED FOR APPELLATE COURTS TO DETERMINE WHEN A DISTRICT COURT'S JUDGMENT BECOMES FINAL.

The First Circuit put matters best by saying: "There is no precise formula for construing judgments." *Harris v. Rivera Cruz*, 20 F.3d 507, 512 (1st Cir. 1994). This lack of a precise formula has split the federal appellate circuits in assessing the finality of district courts' judgments. Certain circuits, like the First, actively mine district courts' judgments long after the fact, seeking ambiguities which might spring open the judgment and unfairly return litigants to the fray. Other circuits defer much more to district courts' informed determinations that judgment should enter. The crucial issue for this Court to determine is what standards should govern appellate courts' inquiries into whether, and when, district courts' judgments become final.

Only the Court of Appeals for the Fifth Circuit has shown any approval of the treatment of district court judgments displayed by the court of appeals in this case. *See Burge v. Parish of St. Tammany*, 187 F.3d 452, 467 (5th Cir. 1999) ("When, as here, the record clearly indicates that the district court failed to adjudicate the rights and liabilities of all parties, an order cannot be presumed to be final irrespective

of the district court's intent.") (citations omitted).[3] This approving citation in *Burge* does not indicate that the Court of Appeals for the Fifth Circuit would have applied the *Harris* principle in this case, or that the court of appeals stood on firm ground in doing so.

Other circuits, on the other hand, have clearly indicated their unwillingness to run roughshod over the deference due a district court's separate judgment *and*, as in this case, a district court's subsequent explanations for entering judgment (and denying reopening). Nor has any federal appellate court indicated that it would take such steps.

For instance, the Court of Appeals for the Ninth Circuit has concluded that entry of a separate final judgment clearly shows the district court's intent "that the order be the court's final act in the matter." *Elliott v. White Mountain Apache Tribal Ct.*, 566 F.3d 842, 846 (9th Cir. 2009). *Cf. Nat'l Distrib. Agency v. Nationwide Mut. Ins. Co.*, 117 F.3d 432, 434 (9th Cir. 1997) ("Had the court entered a separate judgment subsequent to the dismissal order, we would be

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[3] Notably, the *Burge* court did not take the course of action taken by the court of appeals in this case. Rather, the *Burge* court concluded that the order below leaving unresolved certain rights and liabilities of the parties "was not an appealable final judgment," 187 F.3d at 467, and declined to exercise appellate jurisdiction, rather than recognizing appellate jurisdiction, summarily affirming the judgment on its merits, then revisiting the issue of the propriety of entering judgment over a year and a half later.

confident the court intended no further action in the case.") (citations omitted).

Where a district court "followed [the Ninth Circuit's] advice and helpfully entered a final judgment" conveying its intent, and where other evidence showed, as the extrinsic evidence in this case does, full adjudication of all outstanding issues, the Ninth Circuit "ha[d] no trouble concluding that the district court intended" for its order and judgment to finally resolve the case, and correctly deferred to the district court's determination. *Elliott*, 566 F.3d at 846. *Cf. Korenica v. Soc. Sec'y Admin.*, 207 F. App'x 888, 889 (9th Cir. 2006) (mem.) ("Given the absence of a separate judgment, . . . and some ambiguity about whether the district court intended the order to be final, we must dismiss this appeal for lack of appellate jurisdiction.") (citation omitted).

And in *Paganis v. Blonstein*, the Court of Appeals for the Seventh Circuit considered a district court's memorandum opinion and order that concluded: "the court dismisses the instant action with respect to all defendants." 3 F.3d 1067, 1068 (7th Cir. 1993). The memorandum opinion and order accompanied a separate judgment that read: "IT IS ORDERED AND ADJUDGED that pursuant to the court's memorandum opinion and order judgment by dismissal pursuant to Federal Rule[ ] of Civil Procedure 12(b)(6) is entered in favor of defendants, WAL-MART, EAGLE REAL ESTATE, BLONSTEIN, and PAXSON against plaintiffs." *Id.*

Rejecting the plaintiffs' argument that the language of the judgment was "too ambiguous to determine the disposition of the case," the *Paganis* court held that the "judgment dismissed the entire action" by using "language of finality indicating that the plaintiffs [were] denied all relief." *Id.* at 1070. Importantly, the court went even further, pointing out that district courts need not "use certain magic words" to enter a final judgment under Federal Rule 58; rather, "[w]hat the judgment entry *must* do is state that the plaintiffs are denied all relief." *Id.* at 1071.

The judgment issued by the district court in *Paganis* stated as much, and the judgment issued by the district court in this case used similar language of finality to indicate that judgment would enter in favor of Atlantech and Universal, and that no additional relief would be granted. The language used by the *Paganis* court indicates that court's recognition of its proper role in the federal judicial structure: reading district courts' judgments with a practical, rather than a technical, eye, and showing due deference to a judgment, once entered.

These opinions illustrate a sharp divergence in the treatment of district courts' separate, final judgments by the First and Fifth Circuits and, on the other hand, by the Ninth and Seventh Circuits. The former espouse the untenable view that appellate courts always have the authority to revisit, reopen, and vacate judgments on their merits, based on arguable ambiguities pressed years after those judgments

have been entered, often by litigants who slept on their appeal rights. The latter espouse the far more sensible view that district courts' separate, final judgments are *final*, subject only to timely appeal or collateral attack, and that appeal from denial of a motion to reopen such a judgment does not bring the judgment up for review.

More important than the circuit split itself, though, is the *source* of the split: the lack of a standardized procedure for assessing the finality of district courts' judgments. Without a uniform procedure, federal appellate courts continue to craft their own, each differing in material ways from the ones that have gone before. This Court should step in and give definition to this formless state of affairs, which continues to alter disputes at their core.

II. THE COURT OF APPEALS ERRED IN REVISITING THE UNDERLYING JUDGMENT ON AN APPEAL FROM THE DENIAL OF A FEDERAL RULE 60(b) MOTION.

District courts serve numerous critical functions in the larger structure of the federal judiciary. One central role played by every district court is that of a close steward to litigants' quarrels – deeply involved with the parties and their counsel, growing and remaining intimately aware of the areas of agreement and dispute.

In consideration of this unique role, federal appellate courts have long shown substantial deference to district courts' determinations that all outstanding, material issues have been resolved in a given dispute, making entry and execution of final judgment appropriate. *See, e.g.*, *Curtiss-Wright Corp. v. Gen. Elec. Co.*, 100 S. Ct. 1460, 1466 (1980) ("[T]he proper role of the court of appeals [in determining whether entry of final judgment was appropriate on a given claim for relief] is not to reweigh the equities or reassess the facts but to make sure [only] that the conclusions derived from those weighings and assessments [by the district court] are juridically sound and supported by the record."). So strong is this deference that appellate courts invoke it "even if the underlying judgment is erroneous." *Gibbs v. Maxwell House*, 738 F.2d 1153, 1155 (11th Cir. 1984) (citations omitted).[4]

Above all, the determination of whether a district court finally decided all of the issues in a given case must "be given a 'practical rather than a technical construction.'" *Gillespie v. U.S. Steel Corp.*, 85 S. Ct. 308, 311 (1964) (quoting *Cohen v. Beneficial Indus. Loan Corp.*, 69 S. Ct. 1221, 1225 (1949)).

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[4] Where questions linger about whether any material issues remain and whether final judgment was proper – that is, "[i]n the uncertain borderlands of finality" – "the district court determination to enter judgment should help to resolve doubts in favor of finality." 15A Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 3914.7 (2d ed. 1987).

In this case, the district court did much more than make an informed determination that no material issues remained and that entry of final judgment was appropriate – which, in itself, would warrant great deference on appeal. Rather, as directed by the court of appeals, the district court also *supplemented* its summary judgment order, memorandum opinion, and separate judgment with a six-page memorandum detailing, in straightforward terms, why judgment was entered and why Atlantech's motions to reopen had been denied.

All for naught. The court of appeals showed none of the deference due the district court's extensive, well-reasoned position on the propriety of entering final judgment. By vacating in part the district court's final judgment, the court of appeals struck out on its own, taking a course that no other federal appellate court has taken in the past and, moreover, that the majority of federal appellate courts would not have taken under such circumstances.

A. The Court of Appeals Misapplied Its Own Precedent in Ignoring Extrinsic Evidence That Shed Light on the District Court's Intent.

To support its conclusion that the district court's separate judgment was too ambiguous to qualify as "final" for appeal purposes, the court of appeals cited to *Harris*, and *Harris* alone. *Harris* departed from the established principle that, on appeal from a denial of

post-judgment relief, a district court's judgment may not be revisited. But even more pertinently, the court of appeals ignored extrinsic evidence that *Harris* directed it to consider.

In *Harris*, the district court "entered an order determining that [one plaintiff] had passed [a realtor's] examination and directing the [Real Estate Examining] Board to issue her a license." *Id.* at 509. The district court's order further "stated that 'because both parties ha[d] previously agreed that this was the only issue remaining in the case, [j]udgment [would] be entered accordingly.' " *Id.* The district court then entered a " 'Judgment' which decreed that '[j]udgment be entered in favor of the plaintiffs . . . as both of the[ ] plaintiffs ha[d] passed the realtor's examination' and 'order[ing]' that the Board issue real estate broker's licenses to the plaintiffs," without referencing the damages claim made by one of the plaintiffs. *Id.*

In assessing finality, the appellate court in *Harris* conceded that if the district court's "judgment had explicitly terminated the entire case, [the court of appeals] would treat that judgment as final, so far as a later attack upon it or attempt to undo it [was] concerned." *Id.* "The point," according to the panel deciding *Harris*, was "that a judgment purporting to be final [would move] the case toward repose. If errors remain[ed], the proper course for an aggrieved litigant [would be] to appeal, and to do so within the time allowed." *Id.*

But, on its own review, the court of appeals resorted to extrinsic evidence – namely, the order accompanying the separate judgment – to determine whether the judgment could be considered "final." The court of appeals noted that "[n]othing in the [district court's] order or the separate judgment stated that the judgment was final as to all claims or that the case was formally complete." *Id.* at 509. Noting that "[a] damage claim had been asserted and never resolved" and that, in any event, such claim "was [not] ripe for resolution [when judgment was entered] since no license had issued and . . . there was no end point for calculating any damages that might be due," the court concluded that "a measure of uncertainty remain[ed]." *Id.* at 511, 512.

Given the court's "reluctan[ce] to construe a judgment ambiguous on its face as a final judgment where it could plausibly be read as non-final, where extrinsic evidence [did] not wholly resolve the uncertainty, and where reading it as final could unfairly forfeit the rights of a party," the court vacated the district court's order as to the plaintiff seeking damages and remanded the case. *Id.* at 512.

The hook used by the panel in this case to purportedly align the facts with those considered by the *Harris* panel was the district court's notation, in its March 24, 2008 order, that Atlantech's summary judgment motions was allowed "[w]ith respect to the contract assignment issue" only. App. 46. Given that notation, the panel concluded that "the [district

court's] Judgment itself neither purported to be final nor explicitly terminated the case." App. 2.

But unlike in *Harris*, the district court here *also* entered its judgment in accordance with the March 2008 memorandum opinion laying out its reasoning, which the appellate court unabashedly ignored.

The memorandum opinion clearly indicated that the district court intended for the separate judgment to completely conclude this litigation, and that the district court determined that the relief granted to Atlantech by the separate judgment would make Atlantech whole. For instance, in a footnote toward the end of the memorandum opinion, the district court clarified that "[i]n view of [its] decision on summary judgment and Atlantech's request for injunctive relief, th[e] court [did not] need [to] reach Atlantech's claims for negligent misrepresentation and intentional interference," which "include[d] [Petitioner's] *Motion for Summary Judgment* and Universal's *Motion for Summary Judgment* with respect to these counts." App. 44 n.87.

The district court made this statement without qualification or suggestion that additional resolution of those claims, or additional remedies, would be forthcoming. Rather, the district court concluded that consideration of those claims and any award of additional remedies was unnecessary given the injunctive relief that the judgment would confer to Atlantech, and entered judgment accordingly.

Further distancing itself from *Harris*, the district court cemented its March 2008 judgment and memorandum opinion by issuing the six-page January 2010 memorandum at the court of appeals' behest. With regard to its disposition of the case, the district court clarified (nearly two years after the fact) its intent to "grant[ ] summary judgment . . . in favor of [Atlantech] on its contract claims[ ] and order[ ] specific performance and injunctive relief[,] . . . also [holding] that it 'need not reach Atlantech's claims for negligent misrepresentation and intentional interference,' " and deciding instead to "enter[ ] judgment in favor of Atlantech[and] clos[e] the case." App. 9 – App. 10.

If any arguable ambiguity remained after the district court entered separate judgment on March 24, 2008, thus possibly rendering that judgment non-final for review purposes, the district court dispelled such ambiguity in clearly laying out its reasoning, and the intended result of its March 2008 judgment, in the extensive January 2010 memorandum.

Through its misapplication of the procedure laid out by *Harris*, though, the court of appeals ignored extrinsic evidence that clearly indicated what the district court intended to accomplish in entering its separate judgment and closing this case in March 2008. In ignoring its own procedure for assessing the finality of a district court's judgment, the court of appeals erred in refusing to give due deference to the clear statements of the district court's intent, instead striking out on its own, in unprecedented fashion, to

revisit the district court's summary judgment and order on their merits.

B. The Court of Appeals Misused *Harris* to Revisit and Vacate the District Court's Separate Judgment and, in Doing So, Defied the Federal Rules of Appellate Procedure.

In this case, the court of appeals took *Harris* further than ever intended, and into territory that the Federal Rules of Appellate Procedure do not permit. The final disposition in *Harris* was vacatur of a post-judgment order entered by the district court — an order which had been timely appealed. Here, in contrast, the court of appeals misused *Harris* to vacate in part the judgment *itself*, which the district court entered over two years earlier and was never appealed by Atlantech, in blatant contravention of the strict appeal time limit set by Federal Rule of Appellate Procedure 4(a)(1)(A).

That Rule provides that, in a civil case, a notice of appeal must be filed within thirty days of judgment. Federal Rule of Civil Procedure 58(b)(2)(A), which mandates the entry of a separate judgment, starts the Rule 4(a)(1)(A) clock, and compliance with the time limit of Rule 4(a)(1)(A) is "mandatory and jurisdictional." *Browder*, 98 S. Ct. at 560; *Moody Nat'l Bank of Galveston v. GE Life & Annuity Assur. Co.*, 383 F.3d 249, 250 (5th Cir. 2004); *Farley Transp. Co.*

v. Santa Fe Trail Transp. Co., 778 F.2d 1365, 1368 (9th Cir. 1985).

Certain requirements of Rule 4(a)(1)(A) may not be waived or extended by the federal courts of appeals. Federal Rule of Appellate Procedure 26(b), in part, expressly provides that a federal appellate court "may not extend the time to file: (1) a notice of appeal (except as authorized in Rule 4) or a petition for permission to appeal." Common-law interpretation of these appellate rules confirms that circuit courts adhere to the unambiguous thirty-day requirement. *See Peake v. First Nat'l Bank and Trust Co. of Marquette*, 717 F.2d 1016, 1018-19 (6th Cir. 1983); *Weinberger v. United States*, 559 F.2d 401, 402 (5th Cir. 1977); *Hamilton v. Nakai*, 453 F.2d 152, 155 (9th Cir. 1971), *cert. denied*, 92 S. Ct. 2044 (1972).

The underlying judgment in this case was entered by the district court on March 24, 2008, by separate document in accordance with Rule 58. Petitioner timely appealed this decision; Atlantech did not. After the prescribed time period to appeal expired, Atlantech filed two Rule 60(b) motions to reopen, neither of which "toll[ed] the time for appeal from, or affect[ed] the finality of, the original judgment." *Browder*, 98 S. Ct. at 560 n.7.

The time period in which to appeal the district court's single Rule 58 separate, final judgment expired on April 23, 2008. The court of appeals, however, in defiance of the Federal Rules of Appellate Procedure, and without any foundation in its own

precedent, extended the time period for Atlantech to appeal the district court's underlying judgment from thirty days to two years. And, in the end, the court of appeals vacated a majority of the district court's underlying judgment.

Atlantech did not appeal the district court's separate, final judgment on its merits, and the district court acted within its discretion in denying Atlantech's repeated motions to reopen the case. The ship had sailed; yet the court of appeals handed Atlantech a lifejacket after more than two years. No justifiable legal basis existed for the court of appeals' action. Rather, in a manner inconsistent with the Federal Rules, the court of appeals forged ahead into uncharted waters, far from the safe shores of appellate-court deference to a district court's decision to enter final judgment. This Court has the power to remedy such blatant disregard for judicial procedure and the parameters of appellate authority.

CONCLUSION

The questions presented address a federal appellate court's manner of determining the finality of a purportedly ambiguous judgment, including the deference given to the intent of the district court. While analyzing a purportedly ambiguous judgment, not all circuits consider the same factors, and there is no consistency amongst the circuits with respect to the weight given to each factor. Embedded in this

finality of judgments issue is whether a federal appellate court has the legal authority to revisit the merits of a two-year-old judgment when its appellate jurisdiction is based solely on the district court's denial of a motion to reopen the case. While the First Circuit believes it possesses such legal authority, despite defying its own precedent and the Federal Rules of Appellate Procedure to reach such a conclusion, not all circuits arrive at this conclusion. This Court has the power to dictate uniformity in the federal circuits by narrowing and defining the factors which render a judgment final. For these reasons, the Petitioner respectfully requests that this Court grant its petition for writ of certiorari.

Respectfully submitted,

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Attorney for Petitioner
APC Acquisition Corporation, Inc.

United States Court of Appeals
For the First Circuit

Nos. 09-1726
10-1180

ATLANTECH INCORPORATED,

Plaintiff, Appellant,

v.

AMERICAN PANEL CORPORATION, ET AL.,

Defendants, Appellees.

Before

Torruella, Selya and Howard,
Circuit Judges.

JUDGMENT

Entered: May 19, 2010

Appellant Atlantech Inc. appeals the denial of its second motion to reopen a case that was closed in March 2008. Because of inconsistencies among the Order, Memorandum, and separate Judgment, which gave the impression of "unfinished business at the time of the judgment," we remanded the matter for the district judge to explain why he declined to conduct further proceedings.

Having considered the judge's Memorandum of January 11, 2010, and supplemental briefing from the

parties, we find that the Judgment was too ambiguous to be final when it was entered. Like the appellant in *Harris* v. *Rivera Cruz,* 20 F.3d 507 (1st Cir. 1994), Atlantech retained at the time of the Judgment a damage claim that had not been waived or settled or tried to a sum certain; and the Judgment itself neither purported to be final nor explicitly terminated the entire case. *Id.* at 509-11. The March 2008 Order specified that the motions for summary judgment were being allowed or denied only "[w]ith respect to the contract assignment issue." On these facts, the undocketed closure of the case did not resolve all doubts in favor of finality. This court's summary affirmance in Appeal No. 08-1492 does not alter the situation; the judgment appealed from included an injunction that conferred appellate jurisdiction regardless of finality.

In our view, the Judgment did not become cumulatively final until April 22, 2009, when the district judge denied reopening a second time, leaving the case for dead. The first denial of reopening occurred while the injunction appeal was pending and could reasonably have been viewed as a decision not to go forward with damages until the appellate issues (such as assignment of liability) had been resolved. The lack of an explanation extended the ambiguity of the original Judgment, forestalling finality.

In the interest of fairness, we treat Atlantech's appeal of the second denial of reopening as its timely appeal of the cumulatively final judgment. Our mandate in Appeal No. 08-1492 encompassed the

grant of a permanent injunction with respect to the "1040"-series displays and the issues underlying that remedy. In light of the March 2008 Order, which otherwise limited itself to the contract assignment issue, we regard as open the other summary judgment issues that were pending before March 24, 2008. The district judge erred by spurning further proceedings.

Leaving in place the permanent injunction affirmed by Appeal No. 08-1492, we *vacate* the March 2008 Judgment in part and the April 22, 2009 order denying Atlantech's motion for partial summary judgment with respect to the "800"-series displays. The matter is *remanded* to the district court for further proceedings. The parties should have an opportunity to submit fresh papers.

Appeal No. 10-1180 is *dismissed* for want of appellate jurisdiction. The motion to consolidate the two appeals is *denied,* as moot.

So ordered.

By the Court:

/s/ Margaret Carter, Clerk.

cc:
Michael Gregory Andres
John Anthony Christy
John F. Farraher, Jr.
Michael James King
Michelle Roback Kraynak
Justin P. O'Brien
Irwin B. Schwartz

United States Court of Appeals
For the First Circuit

No. 09-1726

ATLANTECH INCORPORATED,

Plaintiff, Appellant,

v.

AMERICAN PANEL CORPORATION, ET AL.,

Defendants, Appellees.

Torruella, Selya and Howard,
Circuit Judges.

ORDER OF COURT
Entered: December 30, 2009

Appellant Atlantech Incorporated appeals the denial of its second motion to reopen the case. As it did when denying reopening the first time, the district court gave no explanation for its order.

It is unclear to us why the court closed the case in the first place. The order, memorandum, and separate judgment of March 24, 2008, decided some claims (in part or whole) on the merits, bypassed others (apparently as moot), and awarded only injunctive relief on the contractual claims despite finding that Atlantech had suffered damages from one defendant's breach of contract. There was unfinished business at the time of the judgment and we

should like to know why the court declined to conduct further proceedings. Until it clarifies its thinking, we take no view as to when the judgment became final – with the entry of the March 2008 judgment; the first denial of reopening; the second denial of reopening; or, as appellant maintains, never.

The matter is remanded in part for clarification of the district court's order. The district court is directed to file a written response with the clerk of this court no later than 30 days from the date of this order. We will retain appellate jurisdiction.

By the Court:

/s/ Margaret Carter, Clerk

cc:
Hon. Joseph L. Tauro
Sarah A. Thornton, Clerk.
Michael G. Andrews
John A. Christy
John F. Farraher Jr.
Michael James King
Justin P. O'Brien
Michelle Roback Kraynak
Irwin B. Schwartz

United States Court of Appeals
For the First Circuit

No. 08-1492

ATLANTECH INCORPORATED,

Plaintiff, Appellee,

v.

APC ACQUISITION CORPORATION, ET AL.,

Defendants, Appellants.

Before

Lynch, *Chief Judge*,
Torruella and Howard, *Circuit Judges*.

JUDGMENT

Entered: October 27, 2008

The judgment of the district court is summarily *affirmed* essentially for the reasons explained in its Memorandum of March 24, 2008. *See* 1st Cir. R. 27.0(c). Appellee had standing to "seek[ ] the performance of rights it directly contracted for under its contracts" with defendant American Panel Corporation. Mem. at 10 n. 42. Appellant's remaining arguments are either risible (parole evidence of its own intent overrides the plain language of the Asset Purchase Agreement) or forfeited (parole evidence should not have informed district court's specification of the Data Warehouse Documents).

We will *deny,* the motion for damages for a frivolous appeal. Appellee's request for a ruling regarding the so-called "administrative closure" of the case is also *denied.* An appeal of the denial of its motion to reopen was available but not taken.

By the Court:

/s/ Richard Cushing Donovan, Clerk

[cc: Michael Andrews, Michael King, Justin O'Brien, Irwin Schwartz, John Christy, Michelle Roback Kraynak]

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

ATLANTECH INC.,	*	
Plaintiff/Appellant,	*	
v.	*	Civil Action No.
AMERICAN PANEL CORP.,	*	07-10342-JLT
APC ACQUISITION CORP.,	*	
INC., and UNIVERSAL	*	
AVIONICS SYSTEMS CORP.,	*	
Defendants/Appellees.	*	

MEMORANDUM

January 11, 2010

TAURO, J.

This is in response to an *Order of the Court*[1] issued by the First Circuit Court of Appeals on December 30, 2009. That order directed this court to file a written submission within 30 days to clarify its thinking as to "why the [district] court declined to conduct further proceedings" in the action now being appealed. In requesting clarification, the First Circuit commented:

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[1] The *Order of the Court* is attached to this memorandum as Appendix A.

> It is unclear to us why the court closed the case in the first place. The order, memorandum, and separate judgment of March 24, 2008, decided some claims (in part or whole) on the merits, bypassed others (apparently as moot), and awarded only injunctive relief on the contractual claims despite finding that Atlantech had suffered damages from one defendant's breach of contract. There was unfinished business at the time of the judgment and we should like to know why the court declined to conduct further proceedings. Until it clarifies its thinking, we take no view as to when the judgment became final – with the entry of the March 2008 judgment; the first denial of reopening; the second denial of reopening; or, as appellant maintains, never.

The following abbreviated procedural history is relevant to an explanation of the actions of this court. On February 21, 2007, appellant/plaintiff Atlantech filed suit against American Panel Corp., APC Acquisition Corp., Inc. ("APC Acquisition") and Universal Avionics Systems Corp., to obtain specific performance, injunctive relief and damages in connection with the sale of certain specialized aircraft LCD displays. On March 24, 2008, this court granted summary judgment (the "*March 2008 Order*") in favor of appellant on its contract claims, and ordered specific performance and injunctive relief.[2] In so

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[2] 1:07-cv-10342-JLT, Docket No. 114.

doing, this court also held that it "need not reach Atlantech's claims for negligent misrepresentation and intentional interference,"[3] lodged against all defendants in the case. The court then entered judgment[4] in favor of Atlantech, closing the case.

On March 27, 2008, appellee/defendant APC Acquisition filed a *Notice of Appeal*,[5] of the *March 2008 Order*, that had granted summary judgment to Atlantech. APC Acquisition also appealed an order issued on August 24, 2007 denying its motion to dismiss for lack of personal jurisdiction. But, significantly, appellant/plaintiff Atlantech did not appeal the *March 2008 Order*.

On May 1, 2008, appellant/plaintiff Atlantech filed a *Motion to Reopen Case* ("*First Motion to Reopen*").[6] As that *First Motion to Reopen* is silent on the question of its procedural basis, it was not clear whether appellant/plaintiff sought reconsideration under Fed. R. Civ. P. 59(e), 60(a) or 60(b). The motion was untimely under Rule 59(e), which, prior to its recent amendment, imposed a ten-day deadline on motions to alter or amend judgments. This court was, therefore, "without authority to consider it under

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[3] 1:07-cv-10342-JLT, Docket No. 115, *Memorandum* at p. 21, n. 87.

[4] 1:07-cv-10342-JLT, Docket No. 116.

[5] 1:07-cv-10342-JLT, Docket No. 118.

[6] 1:07-cv-10342-JLT, Docket No. 132.

Rule 59(e)."[7] This court also did not have discretion to entertain this motion under Rule 60(a), because an appeal had already been docketed in the case.

This court, therefore, considered the *First Motion to Reopen* to be a motion for reconsideration pursuant to Rule 60(b). This court denied Atlantech's *First Motion to Reopen* six days later, in accordance with the protocol outlined in *Puerto Rico v. S.S. Zoe Colocotroni*,[8] which advises that "when an appeal is pending from a final judgment, parties may file Rule 60(b) motions directly in the district court without seeking prior leave from [the First Circuit]. The district court is directed to review any such motions expeditiously, within a few days of their filing, and quickly deny those which appear to be without merit, bearing in mind that any delay in ruling could delay the pending appeal."

Substantively, appellant/plaintiff Atlantech presented three arguments in the *First Motion to Reopen*:

- *FIRST*, that Counts V (negligent misrepresentation) and VI (intentional interference with contractual relations) of the *Second Amended Complaint* remained to be tried because, though this court resolved contractual issues in Atlantech's favor in the *March 2008*

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[7] *Fisher v. Kadant, Inc.*, No. 09-1495, 2009 U.S. App. LEXIS 28248, at *16 (1st Cir. Dec. 23, 2009).

[8] 601 F.2d 39, 42 (1st Cir. 1979).

Order, this court "did not dispose of" Atlantech's "tort theories" in its summary judgment order;

- *SECOND*, that this court left for later disposition a ruling on contractual claims relating to APC 890-100 and 890-500 displays; and
- *THIRD*, that the damages portion of the case remained to be tried.

This court, in reviewing these arguments, did not discern any cognizable basis for relief from judgment under Rule 60(b). Rather, the court interpreted appellant/plaintiff's motion as an attempt to relitigate issues directly considered in this court's 22-page *Memorandum* that accompanied the *March 2008 Order*. The *Memorandum* explained that, given "this court's decision on summary judgment and Atlantech's request for injunctive relief, this court need not reach Atlantech's claims for negligent misrepresentation and intentional interference".[9] A separate discussion on the tort claims and damages would have been redundant, in light of the fact that this court had already ordered specific performance of the contract and injunctive relief. The *Memorandum* also explained that a ruling on contractual claims relating to APC 890-100 and 890-500 displays was "unnecessary to the outcome of the matter."[10]

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[9] 1:07-cv-10342-JLT, Docket No. 115, *Memorandum* at p. 21, n. 87.

[10] 1:07-cv-10342-JLT, Docket No. 115, *Memorandum* at p. 7.

The proper procedure for any grievances arising from the *Memorandum* was an appeal. But, Atlantech did not file a direct appeal of this court's *March 2008 Order* and *Judgment*. In failing to do so, Atlantech forfeited its right to challenge the correctness of this court's entry of judgment.[11]

On October 27, 2008, the First Circuit issued a judgment (the "*October 2008 Judgment*") on the appeal of the *March 2008 Order* filed by APC Acquisition Corporation.[12] In that *Judgment*, the First Circuit "summarily *affirmed*" this court's grant of summary judgment in favor of appellant/plaintiff Atlantech, "essentially for the reasons explained in [the district court's] Memorandum of March 24, 2008." Further, the *October 2008 Judgment* denied Atlantech's "request for a ruling regarding the so-called 'administrative closure' of the case," and also noted that "[a]n appeal of the denial of its motion to reopen was available but not taken."

Six months later, on March 23, 2009, appellant/plaintiff Atlantech filed another motion attacking this court's earlier entry of judgment, presenting arguments largely duplicative of those posed in Atlantech's *First Motion to Reopen*. That motion,

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[11] *See Smilow v. Southwestern Bell Mobile Sys.*, 323 F.3d 32, 43 (1st Cir. Mass. 2003) ("Issues raised on appeal in a perfunctory manner (or not at all) are waived.") (citing *Ryan v. Royal Ins. Co.*, 916 F.2d 731, 734 (1st Cir. 1990)).

[12] The *October 2008 Judgment* is attached to this memorandum as Appendix B.

titled a *Motion to Reopen and for Clarification*[13] (the "*Second Motion to Reopen*"), again requested that this court "address . . . (1) Atlantech's contract claims on products upon which Judge Tauro reserved judgment; (2) Atlantech's tort claims upon which Judge Tauro also reserved judgment; and (3) the damages phase of this case, which was bifurcated on December 3, 2007." In addition to rearguing these substantive issues, the *Second Motion to Reopen* also requested that this court clarify "Atlantech's ownership rights in the intellectual property contained in the Data Warehouse Documents," documents that were the subject of part of this court's *March 2008 Order*.

It is clear that, in essence, Plaintiff/appellant's *Second Motion to Reopen* attacked the propriety of this court's original entry of judgment on March 24, 2008. In denying the motion, this court reasoned that it would not be proper to revisit the March 24, 2008 judgment, in light of the First Circuit's *October 2008 Judgment* "summarily *affirm*[*ing*]" that judgment and "den[ying]" Atlantech's "request for a ruling regarding the so-called 'administrative closure' of the case". Atlantech raised no new material arguments in its *Second Motion to Reopen* that would justify post-judgment relief. Moreover, this court understood that, by declining to file an appeal of either this court's *March 2008 Order* or the order denying the *First Motion to Reopen*, the appellant/plaintiff waived or

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[13] 1:07-cv-10342-JLT, Docket No. 139 at p. 1.

forfeited its right to challenge the substance of that decision.[14] In so doing, the court relied in part on the language of the October 2008 Judgment, where the First Circuit pointed out that "[a]n appeal of the denial of [Atlantech's] motion to reopen was available but not taken."

For all of the foregoing reasons, and with the understanding that "Rule 60(b) relief is 'extraordinary in nature' and, thus, 'motions invoking that rule should be granted sparingly,'"[15] this court denied plaintiff/appellant's Second Motion to Reopen on April 22, 2009.

/s/ Joseph L. Tauro
United States District Judge

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[14] *See Smilow*, 323 F.3d at 43.

[15] *Fisher*, No. 09-1495, 2009 U.S. App. LEXIS 28248, at *19 (quoting *Karak v. Bursaw Oil Corp.*, 288 F.3d 15, 19 (1st Cir. 2002)).

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

ATLANTECH INC., Plaintiff v. AMERICAN PANEL CORP., APC ACQUISITION CORP., INC., and UNIVERSAL AVIONICS SYSTEMS CORP., Defendants	* * * * * * * * * * *	Civil Action No. 07-10342-JLT

MEMORANDUM

March 24, 2008

TAURO, J.

Introduction

Plaintiff Atlantech Incorporated ("Atlantech") brings this action to obtain specific performance, injunctive relief and damages against Defendants in connection with the sale of certain specialized aircraft LCD displays. Presently at issue are three cross-motions for summary judgment and Atlantech's request for preliminary and permanent injunctive relief.[1]

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[1] Atlantech's *Motion for Partial Summary Judgment* [#89]; Defendant APC Acquisition Corporation's ("APC") *Motion for Summary Judgment* [#98]; Defendant Universal Avionics Systems Corporation's ("Universal") *Motion for Summary Judgment* [#102]; Atlantech's *Application for Preliminary Injunction* [#29]. Also pending is APC's *Motion to Strike "Affidavit of Nathan*

(Continued on following page)

Factual Background

The relevant facts are as follows.[2] Atlantech is an export trading company that specializes in providing United States-manufactured aircraft LCD displays to foreign aircraft electronics manufacturers.[3] At the time of the events leading to this lawsuit, Atlantech typically purchased the LCD displays from Defendant American Panel Corporation ("American Panel"),[4] a wholly owned subsidiary of Defendant Universal Avionics Systems Corporation ("Universal"),[5] a company that designed, manufactured and finished the displays.

A. 1040 LCD Displays and American Panel's Obligations

On December 2, 2003, Atlantech and American Panel entered into a Memorandum of Agreement

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Bellin in Support of [Atlantech's] Application for Preliminary Injunction" [#44].

[2] These facts are presented in the light most favorable to Defendant APC, the party who does not prevail on summary judgment. *See Alliance of Auto. Mfrs. v. Gwadosky,* 430 F.3d 30, 34 (1st Cir. 2005) ("like the district court, we must scrutinize the record in the light most favorable to the summary judgment loser and draw all reasonable inferences therefrom to that party's behoof.")

[3] *See* Aff. of Nathan Bellin in Supp. of Mot. for Partial Summ. J. ¶ 2 ("Bellin Summ. J. Aff.") [#92].

[4] *See* Second Amended Complaint at 1 [#73].

[5] *See* Universal's Rule 56.1 Statement of Undisputed Material Facts in Supp. of Mot. for Summ. J. at 1 [#104].

("MOA"), in which Atlantech purchased 103 APC 1040-100 AMLCDs displays from American Panel.[6] Several "Applicable Documents" were incorporated into the MOA, including: (1) a Purchase Order; (2) a Product Specification; (3) American Panel's Standard Terms of Sale; (4) a Purchase Agreement, and (5) a Support Agreement.[7]

In the "Reliability/Warranty/Support" section of the Product Specification, American Panel agreed as follows:

> This product shall be supported by the manufacturer for a minimum period of 10 years starting in 2002. In the event the Assembly is changed such that form, fit, or function, are affected, the manufacturer will notify the buyer and end user in writing 60 days prior to such chnges [sic]. In the event that the part is obsoleted at the end of the 10 year period, the manufacturer will notify the buyer and end user with sufficient advanced warning (for example 120 days assuming a 4 month lead-time) to prevent factory or field interruption. The manufacturer will make available prior to obsolescence, either the

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[6] *See* Statement of Undisputed, Material Facts of Record Pursuant to Local Rule 56.1, in Atlantech's Mem. of Law in Supp. of Mot. for Partial Summ. J at 2 ("Atlantech Summ. J. Mem.") [#90]; Memorandum of Agreement Between Atlantech and American Panel Corporation, Ex. A to Bellin Summ. J. Aff. ("Ex. A") [#92-2].

[7] *See* Memorandum of Agreement, Ex. A at 1.

> identification of a suitable alternative, or the opportunity for a "life time buy" at pricing commensurate at the time of obsolescence, or both.[8]

Similarly, in the "Administration" section of the Support Agreement, American Panel agreed as follows:

> 11.1 Discontinuance of Products
>
> In the event Manufacturer discontinues production of any Product, Manufacturer will provide notification to Customer/End User one hundred eighty (180) calendar days before such discontinuance. . . .
>
> 11.2 Length of Product Availability
>
> Manufacturer agrees to support original product through December 31, 2012. *At that point,* the product may be discontinued. If so, the Customer/End User shall be notified 180 days in advance of the planned obsolescence, and shall be permitted to a "Life Time Buy" at prices in line with prior purchase orders.[9]

American Panel also agreed, via the Support Agreement, to create "Data Warehouse Documents" for the product:

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[8] *See* Product Specification, Ex. A at 21.

[9] *See* Support Agreement, Ex. A at 53 (bold removed, italics added).

> **7.1.2 Component Maintenance Manuals**
>
> Manufacturer will create for Customer/End User, CMMs (or equivalently "Data Warehouse Documents") for each agreed to Product. In the event that the manufacturer discontinues the product, or fails to continue either servicing or production, the data held in the data safe including schematics and parts list, will be transferred to the end user. . . .[10]

These Data Warehouse Documents include the intellectual property necessary for the production, diagnostics and repair of the displays including schematics, parts lists, software, test programs and procedures, description of circuit operation, printed circuit board layouts, fixture design, troubleshooting information and special tests.[11]

B. 1040-100 Displays Discontinued; 1040-725 Displays as Replacements

In 2004 or 2005, without notifying Atlantech, American Panel discontinued the 1040-100 display

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[10] *See id.*, Ex. A at 49 (emphasis in original).

[11] *See* Bellin Summ. J. Aff. ¶ 8; Aff. of Nathan Bellin in Supp. of Application for Prelim. Inj. ¶ 7 ("Bellin Prelim. Inj. Aff.") [#31].

line.[12] APC did not make "form, fit and function replacements" available to Atlantech at that time.[13]

In July of 2005, however, American Panel indicated that it could provide a comparable "drop in replacement" for the 1040-100 display – the 1040-725 display.[14] Atlantech marketed the new display to its customers as replacements for the 1040-100 displays.[15] In February of 2006,[16] Atlantech purchased 201 of the 1040-725 displays from American Panel.[17] The parties executed the transaction pursuant to an MOA and incorporated agreements similar to those in the 1040-100 transaction, including a Support Agreement that had the "Data Warehouse Documents" provision.[18]

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[12] Bellin Prelim. Inj. Aff. ¶ 8. Apparently, on August 8, 2003, American Panel began discussing a new line of displays at an industry event – the 1040-500s. *See* Second Amended Compl. at 7. The 1040-500s purportedly had the same form, fit, and function as the APC 1040-100 displays, offered improved performance, and cost less than the APC 1040-100 displays. *See id.* at 7-8. It also appears, however, that American Panel, did not proceed to manufacture the new displays. *See id.* at 8.

[13] Bellin Prelim. Inj. Aff. ¶ 8.

[14] *Id.* at ¶ 9.

[15] *See id.* at ¶ 10.

[16] Atlantech apparently submitted the purchase order in December, which was modified in January, and finally accepted in February. *See* Bellin Summ. J. Aff. ¶ 9.

[17] *See* Purchase Order dated Jan. 29, 2006, Ex. B to Bellin Summ. J Aff. [#92-3].

[18] *See* Bellin Prelim. Inj. Aff. ¶ 9.

On January 19, 2006, however, American Panel informed Atlantech that the new 1040-725 displays could not operate as "drop in replacements" for the 1040-100 displays.[19] The 1040-725 displays were "larger, configured differently, and most importantly, projected the image upside-down."[20]

In March of 2006, American Panel indicated that it could no longer deliver 1040-100 displays or replace them with comparable equipment unless Atlantech took certain steps. Specifically, American Panel stated that it needed certain LCD glass from a glass manufacturer to produce the 1040 displays, and requested that Atlantech pre-pay for 1,000 pieces of this glass and wait at least 10 months for delivery.[21]

In May of 2006, American Panel agreed to correct the upside-down issue in the 1040-725 displays.[22]

During the rest of 2006 and early 2007, however, Atlantech and its customers encountered numerous difficulties with the new 1040-725 displays, both with

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[19] *See id.* at ¶ 12.

[20] *Id.*

[21] *See id.* at ¶ 13. Apparently, American Panel did not have the necessary LCD glass in stock, at least in a sufficient amount, and the glass manufacturer discontinued this particular type of glass. *See id.*

[22] *See id.* at ¶ 14.

a tester prototype as well as the regular units that American Panel eventually delivered.[23]

C. Assets of American Panel Sold to APC Acquisition Corporation

On January 29, 2007, American Panel sold its assets to Defendant APC Acquisition Corp., Inc., ("APC") pursuant to an Asset Purchase Agreement,[24] the details of which will be discussed below.

D. Atlantech's Request for Data Warehouse Documents

Around February 28, 2007, Atlantech's counsel sent a letter to American Panel and APC,[25] demanding the transfer of Data Warehouse Documents for both the APC 1040-100 displays and APC 1040-725 displays to Atlantech.[26] In relevant part, the letter read as follows:

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[23] *See id.* at ¶¶ 15-18, 20. The record on these difficulties is limited, as is the record on American Panel and APC's response to these difficulties.

[24] *See* Asset Purchase Agreement, Ex. A to Aff. of Michael G. Andrews in Supp. of Mot. for Partial Summ. J. ("Asset Purchase Agreement") [#91-2-11].

[25] *See* Aff. of Irwin B. Schwartz in Supp. of Application for Prelim. Inj. ¶ 1 ("Schwartz Aff.") [#32-1].

[26] *See* Letter from Irwin B. Schwartz to APC (Feb. 28, 2007), Ex A to *id.* [#32-2].

> Under the Product Support Agreements incorporated into the above-referenced purchase orders, APC was obligated to create and maintain "Data Warehouse Documents" for APC 1040-AMLCDs delivered to Atlantech under each such purchase order. Based on recent statements made by APC's representatives and Bill Dunn, APC has discontinued production of the APC 1040-AMLCDs delivery under Purchase Order No. 30308 and is refusing to service and produce additional APC 1040-AMLCDs under Purchase Order No. 61109. Accordingly, Atlantech hereby demands that APC, its successors and assigns, transfer to Atlantech the Data Warehouse Documents as provided under Product Support Agreements ¶ 7.1.2.[27]

APC did not respond to the letter.[28]

E. Note on Atlantech's Purchase of Other Displays from American Panel

Atlantech purchased additional displays from American Panel pursuant to agreements similar to the 1040-100 MOA and incorporated agreements. For example, on September 18, 2003, Atlantech purchased 103 APC 890-100 LCD displays,[29] and on July

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[27] *Id.*

[28] *See* Schwartz Aff. ¶ 3 [#32-1].

[29] *See* Memorandum of Agreement between Atlantech and American Panel Corporation, Ex C to Bellin Summ. J. Aff. [#92-4-5]. Although Atlantech reports that the parties entered into

(Continued on following page)

1, 2005,[30] Atlantech ordered 153 APC 890-500 displays.[31] The record, however, on these purchases is less developed, and analysis of these transactions is unnecessary to the outcome in this matter. Accordingly, this court focuses on the 1040 transactions.

Procedural Background

On February 21, 2007, Atlantech filed suit against Defendants American Panel, Universal and APC for breach of warranty, breaches of contract and negligent misrepresentation.[32]

On October 2, 2007, following two amendments to the Complaint, Defendants filed Answers to the Second Amended Complaint, and APC filed a Counterclaim against Atlantech.[33] On November 1, 2007, however, by agreement of APC and Atlantech, this court dismissed the Counterclaim with prejudice.[34]

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this MOA on November 9, 2002, *see* Bellin Summ. J. Aff. ¶ 10, the MOA is dated September 18, 2003.

[30] Bellin Summ. J. Aff. ¶ 10.

[31] *See* Purchase Order, Ex D to Bellin Summ. J. Aff. [#92-6].

[32] *See* Complaint [#1]. Atlantech also alleged that APC and Universal intentionally interfered with contractual relations. *See id.*

[33] *See* American Panel and Universal's Answer [#74]; APC's Affirmative Defenses and Answer to Plaintiff's Second Amended Complaint and Counterclaims [#75].

[34] *See* Judgment [#93].

On April 23, 2007, Atlantech filed an *Application for Preliminary Injunction* seeking access to the Data Warehouse Documents,[35] which this court eventually consolidated with a hearing on the merits. On June 25, 2007, this court ordered Defendants to turn over the Data Warehouse Documents to the court for an *in camera* inspection.[36]

On November 1, 2007, Atlantech filed a *Motion for Partial Summary Judgment* on the issue of whether the contractual obligations were assigned from American Panel to APC.[37] On November 27, 2007, APC opposed Atlantech's *Motion* and filed a cross *Motion for Summary Judgment,* and Universal filed its own cross *Motion for Summary Judgment.*[38]

After replies and surreplies, this court held a hearing on December 19, 2007. Without objection from the Parties, this court indicated that it would rule on the merits, and took all matters under advisement.

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[35] Atlantech's *Application for Preliminary Injunction.* APC filed a *Motion to Strike* relating to certain paragraphs in one of the affidavits filed in support of Atlantech's motion. *See Motion to Strike "Affidavit of Nathan Bellin in Support of [Atlantech's] Application for Preliminary Injunction".* This *Motion* is DENIED.

[36] *See* Order Granting Expedited Discovery [#52].

[37] Atlantech's *Motion for Partial Summary Judgment.*

[38] APC's *Motion for Summary Judgment;* Universal's *Motion for Summary Judgment.* American Panel signed Universal's *Motion. See id.* at 2.

Discussion: Summary Judgment

A. Legal Standard for Summary Judgment

A court may grant summary judgment when the moving party has shown "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."[39] The court must examine the facts in the light most favorable to the non-moving party, resolving any reasonable inference in that party's favor.[40] Summary judgment may enter when a plaintiff fails to show sufficient evidence to establish an essential element of his case on which he bears the burden of proof at trial.[41]

B. Assignment of the Atlantech Contracts

Here, the relevant inquiry solely involves the terms of the MOAs and incorporated agreements. Consequently, this is a question of law for the court to resolve, and Atlantech is entitled to judgment as a matter of law.

1. The Asset Purchase Agreement

As noted above, American Panel sold its assets to APC via an Asset Purchase Agreement. This court,

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[39] Fed.R.Civ.P. 56(c).

[40] *Dasey v. Anderson*, 304 F.3d 148, 153 (1st Cir.2002).

[41] *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

first of all, must decide whether the rights and obligations of the Atlantech contracts were assigned to APC as part of this transaction, or whether these rights and obligations remain with American Panel.

Atlantech's *Motion for Partial Summary Judgment* seeks "to establish that APC Acquisition Corporation, Inc. is the assignee of the contractual obligations owed by . . . American Panel Corporation to Atlantech."[42] In turn, APC's *Motion for Summary Judgment* seeks a determination that APC did not assume any of the Atlantech contracts.[43]

i. Note on the Applicable Law

APC asserts that Georgia law governs interpretation of the Asset Purchase Agreement, and applies Georgia law in its briefs on the assignment issue.[44] In support, APC notes that the Asset Purchase Agreement has a provision entitled "Governing Law,

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[42] Atlantech *Motion for Summary Judgment* at 1. APC argues that Atlantech does not have standing to pursue these claims because it is a third-party beneficiary to the Asset Purchase Agreement, and Section 10.14 of the agreement explicitly prohibits third-party beneficiaries. *See* APC's Brief in Supp. of its Mot. for Summ. J. at 6-7 ("APC Summ. J. Brief") [#105]; APC's Sur-Reply Brief in Opp. to Pl.'s Mot. for Partial Summ. J. and in Further Supp. of its Mot. for Summ. J. at 1-6 [#110]. These set of circumstances, however, do not present a third-party beneficiary situation, because Atlantech seeks the performance of rights it directly contracted for under its contracts.

[43] *See* APC Summ. J. Brief.

[44] *See id.* at 5-6.

Venue," which states that the agreement "will be governed by and construed in accordance with the laws of the State of Georgia without regard to conflicts of law principles."[45] APC also notes that the parties executed the agreement in Georgia.[46] On the other hand, without arguing for the application of Massachusetts law, Atlantech utilizes Massachusetts contract law in its briefs.[47]

This court holds that the choice of law provision controls, and Georgia law applies to this court's interpretation of the Asset Purchase Agreement. In any event, however, the choice of law does not affect the analysis, because the law is the same. In Georgia, "[w]here contract language is unambiguous, no construction is necessary and the court must simply enforce the contract according to its clear terms."[48]

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[45] *See id.* at 5; Asset Purchase Agreement at 35-36.

[46] *See* APC Summ. J. Brief at 5.

[47] Atlantech later noted, however, that "Massachusetts and Georgia law are virtually identical in their rules of contractual interpretation." Atlantech's Mem. in (1) Further Supp. of Atlantech's Mot. for Summ. J. and (2) Opp. to APC Acquisition's Mot. for Summ. J. at 3 ("Atlantech Reply") [#109].

[48] *Caswell v. Anderson*, 527 S.E.2d 582, 582 Ga. App. (2000). *See also id.* at 584 ("Interpretation of a contract involves three steps. First, the court decides if the contract language is unambiguous, and if so the court enforces the contract's clear terms. Second, if the contract is ambiguous, the court must apply the rules of contract construction to resolve the ambiguity. And third, if the ambiguity remains after use of the construction rules, the meaning of the contract must be decided by a jury.") (internal citations omitted).

Likewise, in Massachusetts, "an unambiguous agreement must be enforced according to its terms."[49]

ii. The Assignment

Here, the relevant terms of the Asset Purchase Agreement are unambiguous, and several important provisions demonstrate that the Atlantech contracts were fully assigned to APC.

First, APC purchased American Panel's rights in *all* contracts and purchase orders:

> 1. Sale of Assets
>
> 1.1 *Transfer of Assets*. On and subject to the terms and conditions set forth in this agreement, at the "Closing" . . . , Seller shall sell (or shall cause, in the case of certain Intellectual Property, Parent to sell) to Buyer and Buyer shall purchase from Seller (or Parent, as applicable) *all of Seller's* (or Parent's as applicable) right, title and interest in *all of the assets and rights owned,* held for or used in the conduct of or in connection with the Business, other than the Excluded Assets (collectively, the "Purchased Assets"), including, but not limited to:
>
> . . .

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[49] *Schwanbeck v. Federal-Mogul Corp.*, 592 N.E.2d 1289, 1292 (Mass. App. 1992).

> (d) *All* of [American Panel's] rights . . . in *all* leases, *contracts,* vendor contracts, *purchase orders, sales orders,* rights, warranties, licenses, permits, agreements and other commitments relating to the Business, *including but not limited to* those set forth on Schedule 1.1(d) (collectively, the "Assumed Contracts").[50]

Even though the Atlantech contracts are not specifically listed on Schedule 1.1(d),[51] the above provision clearly indicates that APC assumed all contracts, not just the contracts listed on Schedule 1.1(d). Accordingly, Atlantech's contracts with American Panel constitute part of APC's "Assumed Contracts."

Second, although the Asset Purchase Agreement specifically excludes certain assets and contracts from the transfer, the schedules of excluded assets and contracts do *not* include American Panel's contracts or obligations with respect to Atlantech.[52]

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[50] Asset Purchase Agreement at 1-2 (underline in original, bold removed, italics added).

[51] *See id.* at Schedule 1.1(d).

[52] *See, e.g., id.* at Schedule 1.2(f) and Schedule 1.2(i).

Lastly, the Asset Purchase Agreement expressly provided that the assignment of contracts included the liabilities and obligations under those contracts:[53]

> 1.3 *Assumption of Liabilities*. At the Closing, Buyer will assume and pay, perform and discharge in accordance with their respective terms: (i) *the liabilities under the Assumed Contracts regardless of whether such liabilities accrued or arose before or after the Closing Date*; (ii) the liabilities set forth on Schedule 1.3; (iii) *any and all warranty obligations of Seller arising prior to or after the Closing Date* (whether pursuant to an Assumed Contract or otherwise); (iv) liabilities for the Closing Payroll Expenses; and (v) the principal, interest and any other amounts due under the Dunn Note (collectively the "Assumed Liabilities"). Other than the Assumed Liabilities, Buyer does not assume and shall not in any way be or become liable for, and Buyer does not assume or agree to pay, perform or discharge any debt, claim, lien, obligation, duty, contract, agreement, tax or liability of Seller, known or unknown, contingent or otherwise of any kind or nature, whether or not set forth on the Schedules hereto and whether or not related to the

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[53] Generally, an assignment of a contract is both an assignment of the rights under a contract as well as the delegation of all duties under that contract, unless there is proof of intentions otherwise. *See, e.g.*, Restatement (Second) of Contracts at § 328(1).

> Business or the Purchased Assets (collectively, the "Excluded Liabilities").[54]

Accordingly, regardless of whether certain contracts were assumed, the agreement obligated APC to perform all of American Panel's warranty obligations under any of American Panel's contracts, including the Atlantech contracts.[55] Moreover, because the Atlantech contacts qualify as "Assumed Contracts" under provision 1.1(d), APC also assumed all of the liabilities under those contracts.

The unambiguous terms of the Asset Purchase Agreement establish that American Panel fully assigned all of its contracts with Atlantech to APC. Accordingly, Atlantech's *Motion for Partial Summary Judgment* on the assignment issue is ALLOWED, and APC's *Motion for Summary Judgment* is DENIED.

2. Note on Non-Assignment Clauses

APC asserts that Atlantech's contracts with American Panel contain non-assignment clauses that prevent the contracts from being assigned.[56] This argument fails for two reasons.

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[54] Asset Purchase Agreement at 3 (underline in original, bold removed, italics added).

[55] APC does not contest its responsibility to provide warranty service on the Atlantech displays. *See, e.g.*, APC's Summ. J. Brief at 4.

[56] *See id.* at 8-9.

First, although the MOA and incorporated agreements for the 890 displays purchased by Atlantech contain a non-assignment clause,[57] the executed versions of the 1040 MOAs and incorporated agreements – the operative agreements here – do not.[58]

Second, non-assignment clauses generally do not prevent contracts from being assigned.[59] Instead, the obligor may have a cause of action for damages against the assignor for breach of the non-assignment clause.[60]

3. American Panel and Universal Avionics

Because the Atlantech contracts were assigned from American Panel to APC, American Panel cannot

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[57] The incorporated Purchase Agreement for the 890 displays contains a provision that reads, in part, as follows: "None of the Parties shall assign its rights or delegate its duties under the present Contract without the prior written consent of the other Party." *See* Purchase Agreement at 9 of 13, part of Ex. C to Bellin Summ. J. Aff. [#92-5].

[58] Apparently, APC previously produced an unexecuted Purchase Agreement that contained a non-assignment clause. *See* Atlantech's Mem. of Law in Supp. of Mot. for Partial Summ. J. at 13 n.7 ("Atlantech Summ. J. Mem.") [#90]. The executed Purchase Agreement, however, contains no such clause.

[59] Indeed, APC provides no citations to support its position on this issue.

[60] *See, e.g.*, Restatement (Second) of Contracts § 322(c)(2) ("A contract term prohibiting assignment of rights under the contract, unless a different intention is manifested . . . (b) gives the obligor a right to damages for breach of the terms forbidding assignment but does not render the assignment ineffective.").

incur any liability under these contracts. Universal, therefore, as American Panel's parent company, cannot incur any liability because its subsidiary has no liability. As such, Universal's *Motion for Summary Judgment* is ALLOWED as to Counts I, II, III and IV of the Second Amended Complaint.[61]

Discussion: Breach of Contract and Relief

After determining that APC assumed the Atlantech contracts from American Panel, this court now holds that APC breached its obligations under the 1040-100 MOA and incorporated agreements.

A. The Standard

To establish a breach of contract under Massachusetts law, the plaintiff must demonstrate that: (1) a valid, binding agreement exists; (2) the defendant breached the terms of the agreement; and (3) the plaintiff suffered damages from the breach.[62]

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[61] Counts V and VI will be addressed later.

[62] *Brooks v. AIG SunAmerica Life Assur. Co.*, 480 F.3d 579, 586 (1st Cir.2007) (*citing Michelson v. Digital Fin. Servs.*, 167 F.3d 715, 720 (1st Cir.1999)). Atlantech and APC agree that *Michelson* is the appropriate standard for breach of contract analysis. *See* Atlantech's Mem. of Law in Supp. of Application for Prelim. Inj. at 9-10 ("Atlantech Prelim. Inj. Mem.") [#30]; APC's Mem. in Opp. to Pl.'s Application for Prelim. Inj. at 7 ("APC Prelim. Inj. Opp.") [#42].

B. Valid and Binding Agreements

First, there is no dispute that the MOAs for the 1040 displays, along with the incorporated documents, constituted valid and binding contracts between American Panel and Atlantech. Because the Asset Purchase Agreement validly assigned the contracts from American Panel to APC, these contracts are now binding on APC as well.

C. Breach of Agreements

Second, APC has clearly breached the terms of the 1040-100 MOA and incorporated agreements. These documents obligate APC to produce and support the displays for a minimum of ten years (December 31, 2012), provide warranty service, and provide additional support for the displays.[63] Moreover, the Support Agreement specifically provides that American Panel would create for Atlantech (or the end user) Data Warehouse Documents for the displays. If American Panel, and now APC, discontinued *or* failed "to continue either servicing or production," the Data Warehouse Documents would be turned over.[64]

Here, it is undisputed that American Panel discontinued (or "failed to continue . . . production")

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[63] *See* Product Specification, Ex. A at 21; Support Agreement, Ex. A at 53. As noted, APC does not contest its responsibility to provide warranty service on the Atlantech displays.

[64] *See* Support Agreement, Ex. A at 49.

the 1040-100 line of displays in 2004 or 2005.[65] Moreover, after acquiring American Panel's assets, APC never resumed production of the 1040-100 displays.[66] The discontinuation of the product line directly triggers the Data Warehouse Documents provision in the 1040-100 MOA and incorporated agreements.[67] Accordingly, as soon American Panel ceased production of the displays, it should have turned over the 1040-100 Data Warehouse Documents to Atlantech.[68] Because APC has not turned over the documents after assuming the Atlantech contracts, APC is in breach of its obligations under the Data Warehouse Documents provision.

Atlantech argues that APC also triggered the provision when it failed to service the 1040-100

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[65] APC argues that it "has never produced and thus has never stopped producing" the 1040-100 display. APC Prelim. Inj. Opp. at 3. It is undisputed, however, that *American Panel* stopped producing these displays.

[66] *See id.*

[67] In addition to triggering the Data Warehouse Documents provision, the discontinuation breaches the "Length of Product Availability" provision of the Support Agreement, in which American Panel agreed to produce the displays until December 31, 2012. *See* Support Agreement, Ex. A at 53.

[68] Atlantech purchased the displays, and now seeks the documents to perform service work on the displays. Accordingly, Atlantech may be considered the "customer" or "end user" under this provision, and the documents must be turned over to Atlantech.

displays properly.[69] The discontinued production of the displays, however, independently suffices to trigger the Data Warehouse Documents provision.[70] Accordingly, analysis of APC's service work on the 1040-100 displays is not required.

D. Damages

Lastly, Atlantech has established damages as a result of APC's breach of the 1040-100 MOA and incorporated agreements. Atlantech requires access to the Data Warehouse Documents to fulfill its obligations to its customers.[71] Without these documents, Atlantech has incurred substantial costs, such as expenditures to address the problem of not having replacement monitors; resources and time in attempting to repair the monitors itself, including trying to determine the cause of problems and obtain recommendations on repairs; and the costs to Atlantech's business of not being able to fulfill its contracts,[72] which will be addressed in more detail below.

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[69] *See* Atlantech's *Application for Preliminary Injunction* at 3-4; Atlantech Prelim. Inj. Mem. at 6.

[70] The provision requires APC to turn over the documents if the product is discontinued *or* APC fails "to continue either servicing or production." *See* Support Agreement, Ex. A at 49.

[71] *See, e.g.*, Bellin Prelim. Inj. Aff. ¶ 38.

[72] *See, e.g., id.* at ¶¶ 28, 29, 31, 36-38.

E. Specific Performance

In order for a court to order specific performance, a plaintiff must establish that: (1) an adequate remedy at law is unavailable; and (2) the practical burdens of enforcement are not disproportionate to the advantages gained.[73] When examining the proportionality of the burdens and the advantages, courts must ensure that the terms of the contract "are sufficiently definite to provide the basis for an appropriate order."[74] Moreover, generally, "a court will not compel performance if a substantial part of the return performance has not been rendered[.]"[75] Lastly, the court should consider difficulty in enforcement or supervision, and general principles of fairness and public policy.[76]

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[73] *See ER Holdings, Inc. v. Norton Co.*, 735 F Supp 1094, 1103 (D. Mass. 1990); *Sanford v. Boston Edison Co.*, 56 N E 2d 1, 3 (Mass. 1944) ("where damages are an inadequate remedy and the nature of the contract is such that specific enforcement of it will not involve too great practical difficulties, equity will grant a decree of specific performance."). *See also generally*, E A Farnsworth, *Contracts* § 12.7 ("In addition to the adequacy test, a number of other limitations restrict the availability of specific performance and injunction as contract remedies.").

[74] Farnsworth, *supra*, § 12.7.

[75] *Id.*

[76] *See id.*

1. No Adequate Remedy at Law

Atlantech has no adequate remedy at law. First, one of the only ways, if not the only way, to service existing displays is to have access to the intellectual property underlying the design and function of these displays. This information is not publicly available, and exists only in the form of schematics, designs and numerous technical specifications and documentation in the Data Warehouse Documents.[77]

For example, with respect to the displays that are currently in operational airplanes, "Atlantech found that it is impossible to repair and maintain these displays without the Data Warehouse Documents."[78] Additionally, "It would be impossible to replicate the procedures that are required to test the performance of these highly complex parts. . . ."[79] Moreover, without the documents, "[i]t would be difficult, if not impossible," to (1) "ensure that all technical requirements are met;" (2) "diagnose and repair displays covered both during and after warranty;" and (3) "replicate APC displays through a new glass manufacturer . . . as the calibration, measurement and timing data in these documents are vital to such glass manufacturing."[80] Accordingly, Atlantech requires access to the Data Warehouse Documents to fulfill its obligations to its customers.

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[77] *See* Bellin Prelim. Inj. Aff. ¶ 27.

[78] *Id.* at ¶ 29.

[79] *Id.* at ¶ 30.

[80] *Id.*

Second, if Atlantech cannot perform its obligations to its customers, the company will suffer significant economic harm, beyond what it has already suffered.[81] Indeed, according to the Atlantech's president, Atlantech may lose its entire business as a result of APC's breach:

> American Panel's and APC Acquisition's refusal to honor the Agreement required Atlantech to spend significant time and resources to identify manufacturers in order to attempt to mitigate American Panel's breaches. This time-consuming mitigation process has utilized a vast majority of Atlantech's resources and severely restricted its ability to pursue new leads and new contracts. To conserve resources for the mitigation effort, Atlantech was forced to suspend employee salaries. *Atlantech's business operations will no longer be able to operate if it is forced to continue these mitigation efforts, which cannot be matched by revenue streams without the Data Warehouse Documents.*[82]

This type of damage constitutes irreparable harm.[83]

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[81] The company will also incur significant costs to its reputation. *See, e.g., id.* at ¶¶ 38, 34.

[82] *Id.* at ¶ 36 (emphasis added). *See also id.* at ¶ 33 ("Atlantech's very existence as a business depends on meeting its pending contractual commitments.").

[83] *See, e.g., Tri-Nel Mgmt., Inc. v. Bd. of Health*, 741 N.E.2d 37, 46 (Mass. 2001) ("Economic harm alone . . . will not suffice as irreparable harm unless the loss threatens the very existence of

(Continued on following page)

2. Burdens Not Disproportionate

The burdens of requiring APC to specifically perform and turn over the Data Warehouse Documents are not disproportionate to the advantages gained. The terms of the agreement pertaining to the Data Warehouse Documents are definite.[84] Indeed, this is exactly what the Parties contemplated in the event of American Panel, and now APC, discontinued or failed to service the displays.

Additionally, there are no questions of owed performance on the part of Atlantech. Also, this is also a fair provision, one in which American Panel had a choice: If American Panel discontinued or could not or would not service the displays, Atlantech would be given the Data Warehouse Documents. There are also no public policy concerns.

Lastly, enforcing the contract provision here is simple: APC has to turn over a small set of documents to Atlantech. This court has a copy of these documents, and could monitor compliance with little difficulty.

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the movant's business.") (internal citations and quotations omitted).

[84] Consequently, there is no inability "to provide the basis for an appropriate order." Farnsworth, *supra*, § 12.7.

3. Specific Performance Ordered

Accordingly, specific performance is an appropriate and necessary remedy here. Pursuant to the terms of the 1040 MOAs and incorporated agreements, APC is ordered to turn over the Data Warehouse Documents for the 1040-100 displays to Atlantech.

F. Atlantech's Request for Injunctive Relief

Atlantech seeks that the court "[e]njoin APC from breaching the support agreement by ordering APC to provide the Data Warehouse Documents to Atlantech."[85] All of the reasoning in the specific performance analysis can be ascribed to Atlantech's request for injunctive relief,[86] and the result is the same – APC must turn over the 1040-100 Data Warehouse Documents to Atlantech. Accordingly, this court need not independently analyze Atlantech's request, and Atlantech is entitled to preliminary and permanent injunctive relief as to the Data Warehouse Documents for the 1040-100 displays.

G. Note on the 1040-725 Displays

This court has now held that APC assumed the Atlantech contracts from American Panel. APC,

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[85] Atlantech's *Application for Preliminary Injunction* at 4-5.

[86] *See, e.g., ER Holdings, Inc. v. Norton Co.*, 735 F. Supp. 1094 (D. Mass. 1990).

therefore, under the Data Warehouse Documents provision of the 1040-725 Support Agreement, must now either (1) service the 1040-725 displays or (2) turn over the Data Warehouse Documents for the 1040-725 displays to Atlantech. Accordingly, if APC chooses to not provide service on the displays, it must turn over the documents to Atlantech.

Conclusion

For the foregoing reasons, Atlantech's *Motion for Summary Judgment* is ALLOWED; APC's *Motion for Summary Judgment* is DENIED; and Universal's *Motion for Summary Judgment* is ALLOWED.[87]

Also for the foregoing reasons, Atlantech's request for preliminary[88] and permanent injunctive relief is ALLOWED as follows. APC must turn over the 1040-100 Data Warehouse Documents to Atlantech. With respect to the 1040-725 displays, APC must now either (1) provide service on the

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[87] In view of this court's decision on summary judgment and Atlantech's request for injunctive relief, this court need not reach Atlantech's claims for negligent misrepresentation and intentional interference. This includes APC's *Motion for Summary Judgment* and Universal's *Motion for Summary Judgment* with respect to these counts.

[88] Atlantech's *Application for Preliminary Injunction*. As noted above, APC's *Motion to Strike "Affidavit of Nathan Bellin in Support of [Atlantech's] Application for Preliminary Injunction"* is DENIED.

displays or (2) turn over the Data Warehouse Documents for these displays to Atlantech.

An Order has issued.

/s/ Joseph L. Tauro
United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

ATLANTECH INC.,	*	
Plaintiff,	*	
v.	*	
AMERICAN PANEL CORP., APC ACQUISITION CORP., INC., and UNIVERSAL AVIONICS SYSTEMS CORP.,	*	Civil Action No. 07-10342-JLT
Defendants.	*	

ORDER

March 24, 2008

TAURO, J.

For the reasons in the accompanying Memorandum, this court hereby orders that:

1. With respect to the contract assignment issue:

   a. Atlantech Incorporated's ("Atlantech") *Motion for Partial Summary Judgment* [#89] is ALLOWED;

   b. APC Acquisition Corporation's ("APC") *Motion for Summary Judgment* [#98] is DENIED; and

   c. Universal Avionics Systems Corporation's *Motion for Summary Judgment* [#102] is ALLOWED.

2. Atlantech's request for preliminary[1] and permanent injunctive relief is ALLOWED as follows:

   a. APC shall turn over the 1040-100 Data Warehouse Documents to Atlantech by April 15, 2008.

   b. APC shall either (1) service the 1040-725 displays or (2) turn over the Data Warehouse Documents for the 1040-725 displays.

3. APC's *Motion to Strike "Affidavit of Nathan Bellin in Support of [Atlantech's] Application for Preliminary Injunction"* [#44] is DENIED.

IT IS SO ORDERED.

/s/ Joseph L. Tauro
United States District Judge

[1] Atlantech's *Application for Preliminary Injunction* [#29].

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

ATLANTECH INC.,

Plaintiff,

v.

AMERICAN PANEL CORP., APC ACQUISITION CORP., INC., and UNIVERSAL AVIONICS SYSTEMS CORP.,

CA NO: 07-10342-JLT

Defendants..

JUDGMENT

TAURO,D.J.

In accordance with the Court's MEMORANDUM and ORDER of MARCH 24, 2008, it is hereby ordered:

JUDGMENT FOR PLAINTIFF ATLANTECH, INC. and for DEFENDANT UNIVERSAL AVIONICS SYSTEMS CORP.

/S/

Zita Lovett,
Deputy Clerk

Date: March 24, 2008.

United States Court of Appeals
For the First Circuit

No. 09-1726

ATLANTECH INCORPORATED,

Plaintiff, Appellant,

v.

AMERICAN PANEL CORPORATION, ET AL.,

Defendants, Appellees.

Lynch, *Chief Judge*,
Torruella, Selya, Boudin, Lipez,
Howard and Thompson,
Circuit Judges.

ORDER OF COURT
Entered: June 14, 2010

The petition for panel rehearing having been denied by the panel of judges who decided the case and the petition for rehearing en banc having been submitted to the active judges of this court and a majority of the judges not having voted that the case be heard en banc, it is ordered that the petition for rehearing and petition for rehearing en banc be *denied.*

By the Court:

/s/ Margaret Carter, Clerk

cc:
Irwin B. Schwartz
John Anthony Christy
John F. Farraher Jr.
Justin P. O'Brien
Michael Gregory Andrews
Michael James King
Michelle Roback Kraynak